SUPREME COURT, U.S.
FILED
OCT 25 1994
OFFICE OF THE CLERK

No. 94-265

In The

Supreme Court of the United States

October Term, 1994

RICHARD E. WIKBERG,

Petitioner,

v.

ROBERT REICH, SECRETARY OF LABOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Seventh Circuit

PETITIONER'S REPLY BRIEF

ROBERT N. WEINER, ESQ.
Counsel of Record for Petitioner
466 Central Ave., Suite 34
Northfield, Illinois 60093
(708)441-8118

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. The Court Should Grant The Petition To Resolve The Question Whether VEVRA Creates A Property Right Which Cannot Be Terminated Without Affording Constitutional Due Process 2

II. The Court Should Grant The Petition To Fully And Finally Distinguish VEVRA From Ostensibly Similar But Wholly Different Affirmative Action Statutes 3

CONCLUSION. 6

TABLE OF AUTHORITIES

Page

Cases:

Brown v. Sibley,
650 F2d 760 (5th Cir. 1981) 4

DeShaney v. Winnebago County Department of Social Services,
489 U.S. 189 (1989) 2, 3

Heckler v. Chaney,
470, U.S. 821 (1985) 2, 3

Rogers v. Frito-Lay,
611, F.2d 1074, 1080 (5th Cir. 1980) . . 4

Simpson v. Reynolds Metals Co.,
629 F.2d 1226, 244 (7th Cir. 1980) . . . 4

Statutes and Regulations:

Vietnam Era Veterans Readjustment assitance act of 1974,38 U.S.C. § 2011 et. seq. 2, 3, 4, 5

Rehabilitation Act of 1973,
29 U.S.C. 793, ... 3, 4, 5

Servicemens' Readjustment Act of 1944
(PL 346, 22 June 1944) 4,5

Other Materials:

House Report No. 2031, 86th Congress, 2nd Session (1960), reprinted in serial sets Volume 5, Serial 12246. 5

Senate Report No. 94-1243, 94th Congress, 2nd Session (1976) 5

No. 94-265

In The

Supreme Court of the United States

October Term, 1994

RICHARD E. WIKBERG,

Petitioner,

v.

ROBERT REICH, SECRETARY OF LABOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Seventh Circuit

PETITIONER'S REPLY BRIEF

Respondent's arguments point out the reasons that this Court should grant the petition. Respondent does not dispute that this Court has not resolved the issues presented by the petition;

those issues are ripe for resolution in this case.

I. The Court Should Grant The Petition To Resolve The Question Whether VEVRA Creates A Property Right Which Cannot Be Terminated Without Affording Constitutional Due Process.

Nowhere in its arguments does Respondent controvert the assertion that this Court has consistently reserved its judgment on judicial review of agencies' actions where constitutional claims have been presented. Both Heckler v. Chaney, 470, U.S. 821 (1985) and DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), expressly held that this Court did not address, respectively, the issue of judicial review where constitutional claims are raised nor did it address the issue of statutory "entitlement" conferred by statute. Chaney at 838; DeShaney at 195 footnote 2. Inasmuch as these issues have rarely, if

ever, have been raised, this Court has expressly reserved its opinion thereon. This case squarely raises such issues.

With this Court's guidance, issues arising from the creation of property interests by statutes may be resolved and the precedential void left by Chaney and DeShaney may be filled. As a consequence there may be a final resolution of the ultimate issue of when and to what extent judicial review of an agency's action is available where constitutional claims are raised.

II. The Court Should Grant The Petition To Fully and Finally Distinguish VEVRA From Ostensibly Similar But Wholly Different Affirmative Action Statutes.

In its arguments Respondent erroneously attempts to analogize VEVRA to the Rehabilitation Act of 1973, 29 U.S.C. 793, citing several authorities which have

construed such Act to confer upon handicapped persons only the right to file a complaint against an employer with the Department of Labor. Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981); Simpson v. Reynolds Metals Co., 629 F.2d 1226, 244 (7th Cir. 1980); Rogers v. Frito-Lay, 611 F.2d 1074, 1080 (5th Cir. 1980). Such comparison is specious. While certain language of the Rehabilitation Act is similar to that of VEVRA the legislative roots of VEVRA are completely independent to those of the Rehabilitation Act. Therefore, Respondent's reasoning to construe an identity between VEVRA and the Rehabilitation Act is defective. Specifically, VEVRA springs from and is an extension of Servicemens' Readjustment Act of 1944 (PL 346, 22 June 1944), United Statutes at Large 58, pp. 284-300, commonly known as "G.I. Bill" or "G.I. Bill of Rights". *See* S. Rep. No. 94-1243,

94th Cong., 2nd Session (1976), *reprinted in* 1976 U.S.C.C.A.N. 5241. This is all to say that the affirmative action language as it applies to VEVRA is merely a *procedure* to enforce the underlying substantive provisions of VEVRA. It is such substantive provisions of VEVRA which are Petitioner's "property rights" not as Respondent asserts, the procedural mechanisms used to enforce such rights. A close analysis of congressional explication of the G.I. Bill reveals that Congress intended judicial review to be available to aggrieved claimants. Congress did not view veterans' benefits as mere gratuities but instead allowed that such benefits could be construed as "legal obligations" imposed upon the government. House Report No. 2031, 86th Congress, 2nd Session (1960), reprinted in serial sets Volume 5, Serial 12246. Accordingly, VEVRA and the Rehabilitation

Act should be distinguished and the latter should not serve as a guide for the construction of the former.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully Submitted,

ROBERT N. WEINER, ESQ.
466 Central Ave., Suite 34
Northfield, Illinois 60093
(708)441-8118

Counsel for Petitioner
Richard E. Wikberg